Craig Williams Attorney at Law, P.L.L.C.
State Bar #014929
P.O. Box 26692
Prescott Valley, AZ 86312
TEL.: (928) 759-5572
FAX: (928) 759-5573
Email: craigwilliamslaw@gmail.com
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	**P1300CR201001325**
Plaintiff,	
vs.	**RESPONSE re: STATE'S MOTION IN LIMINE, re: CORs**
STEVEN DEMOCKER,	
Defendant.	**(Hon. Gary Donahoe)**

The Defendant, by and through undersigned counsel, hereby Responds to the state's "MOTION IN LIMINE, re: CORs" ("Motion") filed on February 13, 2012. The Defendant does not waive any of his Rights concerning Due Process of Law per the 5th and 6th Amendments of the U.S. Constitution, § 2, Articles 3, 4 and 24 of the Arizona Constitution, and Rule 16.1(d), Arizona Rules of Criminal Procedure.

The state's Motion is merely an attempt to circumvent foundational requirements. The state's Motion should be denied.

In its Motion, the state said:

> "The sole purpose of these witnesses is to establish foundation on business records for the State's case in chief. The State is attempting to admit the several business records pre-trial in order to expedite matters in its case in chief."

(Motion, pg. 1).

The state's request ignores the Confrontation Clause of the 6th Amendment, the right to confront and cross-examine witnesses. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Business records must be introduced through the testimony of a custodian (or other qualified witness) who can be cross-examined concerning the methods of preparation, the qualifications of the preparer, and other relevant matters. See generally: State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). The state must provide the proof required for the business records exception to the hearsay rule, as required by 803(6), Arizona Rules of Evidence, which would include proof by the custodian of records or other qualified witness that the record was made in the regular course of business and that it was the regular practice of the business to make the record. Also, the state must prove the trustworthiness of the business record. Ariz. R. Evid. R. 803(6)(E), a business record is an exception to the rule against hearsay *if* "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."

Otherwise the records are inadmissible hearsay. See: NLRB v. First Termite Control Co., 646 F.2d 424, 429-430 (9th Cir. 1981). In that case, the court noted the importance of a witness in relation to a business record having a substantial interest in the accuracy of the portion of the records at issue.

> In the cases cited by the NLRB, the businesses in whose files the records were located *had a substantial interest in the accuracy of the portion of the records at issue*. In contrast, Economy was indifferent as to the origin of this lumber, and had no interest in the accuracy of that portion of the freight bill.

(*Id.*, italics added).

Other jurisdictions have held that the testimony of the custodian or other qualified witness "is essential:"

> Admission as a business record requires "the testimony of the custodian or other qualified witness." Fed.R.Evid. 803(6). This testimony is essential. NLRB v. First Termite Control Corp., 646 F.2d 424, 427 (9th Cir. 1981). Without such a witness the writing must be excluded. Liner v. J.B. Talley & Co., 618 F.2d 327 (5th Cir. 1980). "Obviously a writing is not admissible . . . merely because it may appear upon its face to be a writing made by a physician in the regular course of his practice. It must first be shown that the writing was actually made by or under the direction of the physician at or near the time of his examination of the individual in question and also that it was his custom in the regular course of his professional practice to make such a record." Masterson v. Pennsylvania R. Co., 182 F.2d 793, 797 (3d Cir. 1950) (decided under the Federal Business Records Act). The mere custody by Conway of the medical records of another doctor does not incorporate them into Conway's business records. See United States v. Davis, 571 F.2d 1354 (5th Cir. 1978).

(Belber v. Lipson, 905 F.2d 549, 552 (1st Cir. Mass. 1990)).

To protect and preserve the Record in this case, the Defendant must be careful to object to hearsay when presented:

> The majority rule is that if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes. Annot., 79 A.L.R.2d 890, § 3 (1961). This is the rule in Arizona. State v. Tafoya, 104 Ariz. 424, 454 P.2d 569 (1969).

(McGann, *supra*, at 299).

For the Record: we object to the admission of hearsay evidence without a proper foundation, and without the hearsay evidence falling into one of the hearsay exemptions outlined in Rule 803.

Finally, the state's Motion did not give a legal basis as to why its request to short-cut the process can be done outside the presence of the jury.

The state's Motion should be denied

RESPECTFULLY SUBMITTED this February 27, 2011.

Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Gary Donahoe, Division One
Jeff Paupore, Steve Young, Yavapai County Attorney's Office
The Defendant
Greg Parzych, via e-mailed .pdf
by: _____